

SECRETARY, BOARD OF  
OIL, GAS & MINING

Docket No. 97-009  
Cause No. M/027/007

040\153228.V1

WSMC access to JMC's property, subject to five conditions. Paraphrased, these are: (1) WSMC must provide ten days' notice prior to entry; (2) WSMC's discovery activities must be approved by government agencies having jurisdiction; (3) WSMC's discovery activities must be approved by JMC; (4) WSMC must show proof of Workers' Compensation coverage; (5) WSMC must indemnify JMC. Of these conditions, only No. 4 is acceptable as posed; condition (1) would only be acceptable with a much shorter notice period. The other three conditions are unreasonable and unacceptable burdens on WSMC's rights of discovery.

3. Rule 34 authorizes entry by one party to litigation upon land within the possession or control of another party to that litigation. The rule is intended to promote efficiency by providing the non-owner, non-possessory party with access to discovery facts by inspection, testing or sampling. Conditions 2, 3 and 5 would unreasonably restrict WSMC's discovery activities, would impose delays that would compromise WSMC's ability to defend itself in the above-captioned action, and would have the potential to expose WSMC to liability for reclamation at the Drum Mine. For the foregoing reasons, WSMC cannot agree to the conditions Jumbo seeks to impose on WSMC's access to the Drum Mine for discovery.

#### WSMC'S RESPONSE TO JMC'S CROSS-MOTION FOR PROTECTIVE ORDER

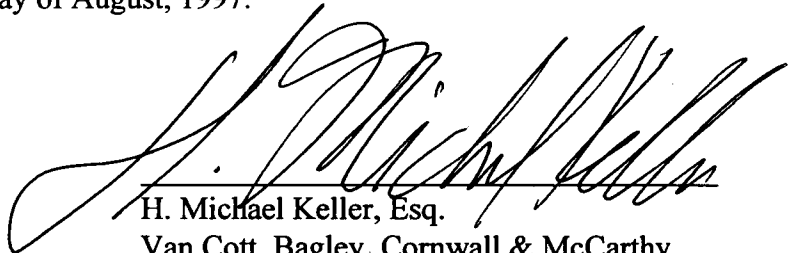
5. JMC, as the owner of the Drum Mine, is in sole possession and control of the property that is the subject of the above-captioned action. WSMC, as a named respondent in this litigation, faces the prospect of serious potential liability. To gather facts on which to base its defense, and to form an estimate of liability, WSMC

must inspect the property for which it is alleged to have reclamation responsibility. JMC has sought a protective order under Utah Rule of Civil Procedure 26(c), seeking to condition or deny WSMC's access for discovery.

Utah Rule of Civil Procedure 26(c) provides that protective orders may be had "for good cause shown," to protect a party against whom discovery is sought from "annoyance, embarrassment, oppression, or undue burden or expense . . ." attendant upon discovery.

The discovery sought by WSMC will not result in any of the harms Rule 26(c) was intended to prevent. JMC has not alleged that any of those harms will result from discovery, nor has JMC made a showing of good cause to impose conditions on WSMC's discovery activities. For these reasons, WSMC requests that the Board deny JMC's cross motion for a protective order.

DATED this 26<sup>th</sup> day of August, 1997.

A large, stylized handwritten signature in black ink, appearing to read "H. Michael Keller".

H. Michael Keller, Esq.  
Van Cott, Bagley, Cornwall & McCarthy  
50 South Main Street, Suite 1600  
P.O. Box 45340  
Salt Lake City, UT 84145

Stephen D. Alfors, Esq.  
Christopher G. Hayes, Esq.  
Alfers & Carver  
730 17<sup>th</sup> Street, Suite 340  
Denver, CO 80202

Attorneys for Western States Minerals  
Corporation

## CERTIFICATE OF SERVICE

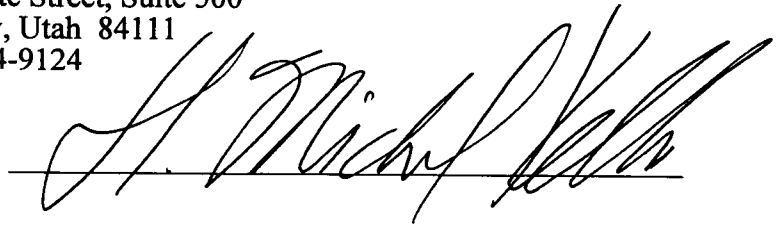
I hereby certify that I caused a true and correct copy of the within and foregoing REPLY OF WESTERN STATES MINERALS CORPORATION TO RESPONSE OF JUMBO MINING COMPANY TO WESTERN STATES' MOTION FOR DISCOVERY, AND RESPONSE TO JUMBO'S CROSS MOTION FOR PROTECTIVE ORDER to be delivered this 26<sup>th</sup> day of August, 1997, by mail, postage prepaid, and by telefax to the following:

Thomas A. Mitchell, Esq.  
Assistant Attorney General, State of Utah  
Attorney for the Division of Oil, Gas & Mining  
160 East 300 South, Sixth Floor  
P.O. Box 140857  
Salt Lake City, UT 84114-0857  
Fax: (801) 366-0221

Daniel G. Moquin, Esq.  
Division of Oil, Gas and Mining  
1594 West North Temple, Suite 300  
P.O. Box 140855  
Salt Lake City, UT 84114-0855  
Fax: (801) 538-7440

Z. Lance Samay, Esq.  
Attorney for Jumbo Mining Company  
1 Washington Street  
P.O. Box 130  
Morristown, NJ 07963  
Fax: (973) 540-1020

Lawrence J. Jensen, Esq.  
Holland & Hart LLP  
215 South State Street, Suite 500  
Salt Lake City, Utah 84111  
Fax: (801) 364-9124

A handwritten signature in black ink, appearing to read "T. Mitchell", is written over a horizontal line.



BEFORE THE BOARD OF OIL, GAS AND MINING  
DEPARTMENT OF NATURAL RESOURCES  
STATE OF UTAH

**FILED**  
AUG 25 1997  
SECRETARY, BOARD OF  
OIL, GAS & MINING

---

IN THE MATTER OF THE PETITION )  
FILED BY THE DIVISION OF OIL, GAS )  
AND MINING FOR AN ORDER )  
REQUIRING IMMEDIATE )  
RECLAMATION OF THE DRUM MINE, )  
FROM WESTERN STATES MINERALS )  
CORPORATION AND JUMBO MINING )  
COMPANY, MILLARD COUNTY, UTAH )

RESPONSE OF WESTERN STATES  
MINERALS CORPORATION

Docket No. 97-009  
Cause No. M/027/007

---

COMES NOW Western States Minerals Corporation, Respondent in the  
above-captioned petition (hereinafter "WSMC"), and offers its response.

JURISDICTION

1. WSMC avers that the statute cited as authority under which the Division of Oil, Gas and Mining (hereinafter, the "Division" or "DOGM") brings this action, Utah Code Annotated § 40-8-7 (1953) as amended) speaks for itself, and this allegation therefore, requires no response.
2. WSMC avers that this allegation cites as authority a statute that speaks for itself and, therefore, requires no response.
3. WSMC avers that the provisions of Section 63-46b-6 through 11 of the Utah Code Annotated (1953 as amended) speak for themselves and, therefore requires no response.

4. WSMC avers that this allegation purports to be a restatement of the provisions of R641-104-151.100, which speaks for itself and, therefore, requires no response.

5. WSMC avers that this paragraph does not contain an allegation and, therefore, requires no response.

#### WSMC'S RESPONSE TO THE DIVISION'S STATEMENT OF THE CASE

WSMC admits the allegation of the first and second sentences of this paragraph. WSMC admits that it received permit approval for the Drum Mine, but avers that the correct date of approval was November 28, 1983. WSMC denies that part of the next two sentences which alleges that WSMC retaining reclamation responsibility for 42 acres of the Drum Mine; if WSMC had such responsibility, it satisfied the conditions the Division imposed for releasing it. WSMC avers that the next sentence speaks for itself and requires no answer. WSMC avers that the next sentence is a disputed statement of fact, the resolution of which may affect WSMC's interests; WSMC has no right of possession or access to the Drum Mine, and has had none since October 12, 1988, lacks sufficient information to form a belief as to the truth of the allegation contained therein and, therefore, denies same. WSMC denies the allegations of the next sentence insofar as they imply that WSMC has reclamation responsibility at the Drum Mine. The final sentence in this paragraph states the Division's prayer for relief; WSMC avers in response that the Division is not entitled to relief, and their prayer should be denied as to WSMC.

## WSMC'S RESPONSE TO THE DIVISION'S STATEMENT OF FACTS

6. WSMC admits the allegation of Paragraph 6.
7. WSMC admits the allegation of Paragraph 7.
8. WSMC admits the allegations of Paragraph 8.
9. WSMC denies the allegation of Paragraphs 9, and states that the permit transfer with conditions was made by DOGM, at the insistence of Jumbo. WSMC avers that it has met the conditions subsequently imposed by the Division on the transfer of the permit to Jumbo, and denies that it has responsibility for reclamation of 42 acres of the Drum Mine.
10. WSMC lacks sufficient information to form a belief as to the truth of the allegations in Paragraph 10 and, therefore, denies same.
11. WSMC lacks sufficient information to form a belief as to the truth of the allegations in Paragraph 11 and, therefore, denies same.
12. WSMC is aware that the Division sent a letter to Jumbo on August 1, 1996, and avers that the contents speak for themselves.
13. WSMC admits that it met with Division staff on August 6, 1996. WSMC admits that the Division delivered a letter to WSMC personnel. WSMC denies that such letter constituted an adequate explanation for the Division's action attempting to increase WSMC's surety estimate. WSMC avers instead that the Division's attempt to increase its surety is without adequate justification, is in violation of R647-4-113-6, and is an abuse of the Division's authority.

14. WSMC is aware that Jumbo sent a letter to the Division on August 6, 1996, and avers that the contents speak for themselves.

15. WSMC admits having received a certified letter sent by the Division on August 9, 1996. WSMC admits that it received a certified letter sent by the Division on August 17, 1996. WSCM avers that the contents of the letters speak for themselves.

16. WSMC lacks sufficient information to form a belief as to the truth of the allegations in Paragraph 16 and, therefore, denies same.

17. WSMC admits the allegations of Paragraph 17.

18. WSMC lacks sufficient information to form a belief as to the truth of the allegations in Paragraph 18 and, therefore, denies same. WSMC avers that if such a fax was sent, the contents speak for themselves.

19. WSMC lacks sufficient information to form a belief as to the truth of the allegations in Paragraph 19 and, therefore, denies same. WSMC avers that any proceeding which alleges that it has reclamation responsibility for the Drum Mine will result in substantial prejudice to its interests.

20. WSMC lacks sufficient information to form a belief as to the truth of the allegations in Paragraph 20 and, therefore, denies same.

21. WSMC lacks sufficient information to form a belief as to the truth of the allegations in Paragraph 21 and, therefore, denies same.

22. WSMC avers that Paragraph 22 speaks for itself, and needs no response.

23. WSMC denies that it is an operator of record at the Drum Mine, and denies that it is in noncompliance with § 40-8-16(2)(c) and Rule R647-4-117.4. WSMC avers that the second sentence of this paragraph states a legal conclusion interpreting the authority granted by the above-mentioned statutory and regulatory provisions. WSMC avers that those provisions speak for themselves and, therefore, the second sentence of this paragraph needs no reply.

#### . WSMC'S AFFIRMATIVE DEFENSES

A. WSMC avers that the Division's "Petition for an Order Requiring Immediate Reclamation of the Drum Mine" fails to state a claim on which relief can be granted and, therefore, should be denied.

B. WSMC avers that the Division is barred from seeking the order it requests by the doctrines of estoppel, laches, and waiver.

#### WSMC'S STATEMENT OF FACTS

WSMC realleges and incorporates by reference the foregoing responses and allegations and further affirmatively alleges as follows:

1. WSMC conveyed all of its right, title and interest in the Drum Mine to Jumbo Mining Company in 1988.

2. DOGM made the full final transfer of the Drum Mine reclamation permit to Jumbo, and the return of WSMC's surety, dependent on two conditions subsequent: that WSMC and Jumbo resolve the issue of which entity is responsible for reclamation under the contract of sale, and that WSMC, Jumbo, or both of them,

demonstrate the existence of an adequate supply of topsoil for reclamation. See Exhibit A.

3. WSMC received a judgment, domesticated in Utah, that fixed reclamation responsibility on Jumbo. See Exhibit B. That decision, which has been appealed and was affirmed by Colorado's intermediate Court of Appeals, has not been stayed, and is in full force and effect. Although Jumbo has sought certiorari from the Colorado Supreme Court, the decision remains in full force and effect pending the Supreme Court's decision on whether or not to review Jumbo's petition.

4. The Division has approved a source of topsoil, see Exhibit C, and, therefore, both conditions set forth in Exhibit A have been satisfied, and WSMC is entitled to a release from further reclamation responsibility, and the return of its surety.

#### PRAYER FOR RELIEF

WHEREFORE, WSMC requests that the Board enter the following order:

A. Dismiss the Notice of Agency Action requested by the Division, to the extent that action is directed at WSMC.

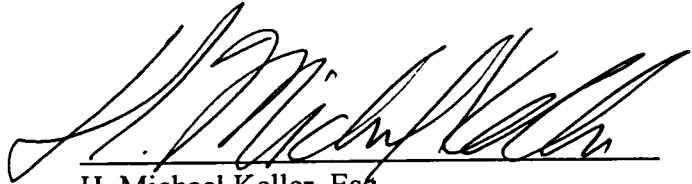
B. Issue a declaration that Jumbo Mining Company is the sole operator of the Drum Mine, as defined in Utah Rev. Stat. § 40-8-4(12), and as the operator is solely responsible for all reclamation at the site and compliance with all applicable statutes and regulations, in particular, R647-4-120.

C. Issue an Order requiring the Division forthwith to assess the correct amount of reclamation surety and levy such amount against Jumbo Mining

Company as a condition of the renewal or grant of any additional permits to Jumbo Mining Company.

D. Issue an Order requiring the Division to return to WSMC the full amount of its surety, as required by Utah Rev. Stat. §§ 40-8-19 and 40-8-14(5) and R647-4-113.

DATED this 25<sup>th</sup> day of August, 1997.

A handwritten signature in black ink, appearing to read "H. Michael Keller", written over a horizontal line.

H. Michael Keller, Esq.  
Van Cott, Bagley, Cornwall & McCarthy  
50 South Main Street, Suite 1600  
P.O. Box 45340  
Salt Lake City, UT 84145

Stephen D. Alfors, Esq.  
Christopher G. Hayes, Esq.  
Alfors & Carver  
730 17<sup>th</sup> Street, Suite 340  
Denver, CO 80202

Attorneys for Western States Minerals  
Corporation



## CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, postage prepaid, a true and correct copy of the within and foregoing RESPONSE OF WESTERN STATES MINERALS CORPORATION this 25<sup>th</sup> day of August, 1997, to the following:

Thomas A. Mitchell, Esq.  
Assistant Attorney General, State of Utah  
Attorney for the Division of Oil, Gas & Mining  
160 East 300 South, Sixth Floor  
P.O. Box 140857  
Salt Lake City, UT 84114-0857

Daniel G. Moquin, Esq.  
Division of Oil, Gas and Mining  
1594 West North Temple, Suite 300  
P.O. Box 140855  
Salt Lake City, UT 84114-0855

Z. Lance Samay, Esq.  
Attorney for Jumbo Mining Company  
1 Washington Street  
P.O. Box 130  
Morristown, NJ 07963

Lawrence J. Jensen, Esq.  
Holland & Hart LLP  
215 South State Street, Suite 500  
Salt Lake City, Utah 84111

A handwritten signature in black ink, appearing to read "T. Mitchell", is written over a horizontal line.

FORM MR-TRL  
(Revised 3/89)

For Division Use:  
File No.: \_\_\_\_\_  
Effective Date: \_\_\_\_\_  
DOGM Lead: \_\_\_\_\_

STATE OF UTAH  
DEPARTMENT OF NATURAL RESOURCES  
DIVISION OF OIL, GAS AND MINING  
355 West North Temple  
3 Triad Center, Suite 350  
Salt Lake City, Utah 84180-1203  
(801) 538-5340

**RECEIVED**  
JUL 11 1989

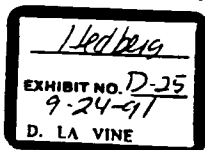
TRANSFER OF NOTICE OF INTENTION  
LARGE MINING OPERATIONS

DIVISION OF  
OIL, GAS & MINING

---0000---

1. (a) Notice of intention to be transferred (file number): M/027/007  
(b) Name of mining operation: Drum Mine  
(c) Location of mining operation (county): Millard, Utah  
(d) Name, telephone number and mailing address of the operator currently holding the notice of intention (transferor):  
Western States Minerals Corporation  
4975 Van Gordon Street  
Wheatridge, Colorado 80033
2. (a) Name, telephone number and mailing address of the operator acquiring the notice of intention (transferee):  
Jumbo Mining Company  
6305 Fern Spring Cove  
Austin, Texas 78730 512- 346-4537  
(b) Name, telephone number and address of the authorized representatives of the Transferee to whom any notices under the provisions of the Utah Mined Land Reclamation Act may be sent:  
Same as above Mr. E.B. King
3. (a) The total disturbed area identified in the approved notice of intention: 143.7 acres original; 126 revised acres  
(b) The actual number of acres disturbed by the operation through date of transfer: 126 acres  
(c) Attach a legal description of above acreages as Appendix "A" and a map of suitable scale with actual disturbed areas clearly shown and identified.  

**E0000553**
4. This application must be accompanied by a fully executed and signed Reclamation Contract (Form MR-RC).



SWORN STATEMENT OF TRANSFEROR

I, ALLAN R. CERNY being first duly sworn under oath, deposes and says that I am SECRETARY of WESTERN STATES MINERALS CORPORATION; and that I am duly authorized to execute and deliver the foregoing obligations; that I have read the said application and fully know the contents thereof; that all statements contained in the transfer application are true and correct to the best of my knowledge and belief based upon the attached map and calculations forwarded to me by E. B. King of Jumbo Mining Company. By execution of this statement I certify that the Transferor is in full compliance with the Utah Mined Land Reclamation Act, the Rules and Regulations Promulgated thereunder, and the terms and conditions of Notice of Intention No. M/027/007.

Western States Minerals Corporation hereby makes no representation in regard to the allocation of responsibility for reclamation as between Western States Minerals Corporation and Jumbo Mining Company.

Allan R. Cerny  
Signature  
ALLAN R. CERNY  
Name (Typed or Print)  
SECRETARY - WSMC  
Title

Subscribed and sworn before me this 6 day of July, 1989.

John R. Riple  
Notary Public

My commission expires:  
August 2, 1991.

State of Colorado )  
County of Jefferson ) ss.

E0000584

FINAL SWORN STATEMENT OF TRANSFeree

E.B. King being first duly sworn under oath,  
depose and say that I am President  
(officer or agent)  
of Jumbo Mining Company; and that I am duly authorized to  
(Corporation/Company Name)

execute and deliver the foregoing obligations; that I have read the  
application and fully understand the contents thereof; that all statements  
contained in the transfer application are true and correct to the best of my  
knowledge and belief. By execution of this statement, the Transferee agrees  
to be bound by the terms and conditions of Notice of Intention  
No. M/027/007, the Utah Mined Land Reclamation Act, and the Rules and  
Regulations promulgated thereunder. *\*Except for those issues*  
*of which the Division, the Dept. of Health and Transfer are on notice.*




Signature

Name (Typed or Print) E.B. King

Title President

Subscribed and sworn before me this 10th day of July, 19 89.

  
Notary Public

My commission Expires:

February 10, 19 90

State of Idaho )

County of Blaine Lake ) ss.

E0000585

APR 25 1995

By Alta V. [Signature]  
SALINE COUNTY Deputy Clerk

FILED IN THE  
DISTRICT COURT

MAY 16 1994

DISTRICT COURT, COUNTY OF JEFFERSON, STATE OF COLORADO

Case No. 90-CV-3966, Division 9

**JUDGEMENT**

JEFFERSON COUNTY,  
COLORADO

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT ON ALL  
REMAINING NON-REFORMATION ISSUES

WESTERN STATES MINERALS CORPORATION,  
a Utah corporation,

Plaintiff,

v.

ASOMA (UTAH), INC., a Delaware  
corporation, JUMBO MINING CO., an  
unincorporated association,  
ED B. KING, a/k/a E.B. KING, and  
JANET KING,

Defendants.

956912382  
4-25-95  
3:12 pm

The parties have agreed and the Court has ordered that all evidence at the preliminary injunction hearing heard March 31, 1991, and all evidence admitted at the Phase One trial as reflected in the transcript of the Phase One trial which was heard in May, 1992, as well as evidence heard in this Phase Two proceeding beginning May 2, 1994, shall be considered as part of the evidence for this Court's ruling on all remaining issues.

Plaintiff, Western States Minerals Corporation ("Western"), sold a gold mining operation in Utah to Defendants ASOMA and Jumbo. At all pertinent times Defendant Edwin B. King was acting for ASOMA and Jumbo. On October 8, 1992, this Court entered Findings of Fact, Conclusions of Law and Orders reforming the contract for the

sale of the Drum Mine by Western to Defendants in a proceeding referred to as Phase One. Judgment entered on Western's claim for reformation, the second claim in its Complaint, on February 23, 1993, nunc pro tunc to January 27, 1993. The contract has now been reformed. The Court incorporates the Findings of Fact and Conclusions of Law from October 8, 1992, in this Order.

#### FACTS

On June 30, 1988, Mr. King, acting on behalf of the Defendant ASOMA entered into an option agreement to purchase the Drum Mine from Western. Jumbo Mining Company is the successor in interest to ASOMA and is a Defendant in this action as well. Defendants knew that the Quitclaim Deed that was part of the Agreement was supposed to say that the "Assignee" (i.e. ASOMA) had the responsibility for reclamation at the mine. Defendants knew that the Quitclaim Deed contained an error which said Assignor had the obligation to reclaim. Defendants nonetheless went ahead and closed on the contract on October 12, 1988, knowing there was an error in the Quitclaim Deed.

The Defendants in fact had agreed to be responsible for all reclamation on the lode mining claims and the properties. The parties and Mr. King on behalf of the companies he represented had discussed the reclamation matter during the 90 day due diligence period prior to closing on October 12, 1988. Prior to closing, Mr. King obtained information concerning heaps which were built by Western without first receiving construction permits, and he

learned that there was a shortage of stockpiled topsoil which would be needed to reclaim the mine site when the mining operation was finished. Defendants agreed to do complete reclamation, specifically including the taking care of unpermitted heaps and the topsoil problem.

The evidence established that reclamation requires the posting of a bond with the state of Utah. The parties contemplated that reclamation, as the term is used in this contract, included putting up a reclamation bond. Mr. King knew that the state of Utah required it, the parties discussed the reclamation matter, and Mr. King conceded during the due diligence period in his conversations with Mr. Cerny that he was obliged to post a bond but was having difficulty in obtaining one. While the contract does not require Defendants to post bond before closing, the evidence establishes that the posting of a bond is a requirement of reclamation. Because the parties intended and the Defendants agreed that Defendants would assume all reclamation, the contract therefore requires the Defendants to assume all reclamation at the Drum Mine site, specifically including the posting of a reclamation bond sufficient to bond all reclamation at the mine.

After closing, things did not go well for Mr. King and his companies. He at first acknowledged that he was to do all the reclamation work; later his stance changed radically and he wrote a letter telling Mr. Cerny of Western that Defendants were only going to do reclamation work on the areas that they mined, taking



the stance for the first time that he had no duties to reclaim previously disturbed areas of the mine. He also communicated this to people at the Division of Oil, Gas and Mining (DOGM) in Utah. He then furnished them maps which, for the first time, contradicted previous maps he had furnished to the Utah authorities. The new maps showed areas where Defendants asserted Western had to do reclamation. In the letter he wrote to Mr. Cerny, Mr. King enclosed a partial copy of the contract and pointed out the provision that "Assignor shall be responsible" for reclamation at the mine. This conduct by Defendants was a clear, unequivocal repudiation of the contract requirement that they assume all reclamation responsibilities at the Drum Mine, and it was a breach of that contract.

The Defendants apparently assert that Western breached the contract at closing by a failure to deliver the mining permit. This contention is not supported by the evidence. The evidence establishes that there had to be a transfer of the mining permit through the Utah authorities from Western to Defendants, and that no one contemplated that the permit could be completed and delivered at the time of closing. A permit transfer could not be completed until the new operator, ASOMA and Jumbo, posted a new bond. This evidence establishes that the operating permit could not be delivered at closing and was not expected to be delivered at closing by the parties. Western cooperated in delivering documents and maps and other materials to effect a complete change of

ownership, and both Mr. King and the experts testified that the permit could not be transferred at the time of closing. I therefore find there was no breach of contract by Western in that regard. The evidence does show that at a time subsequent to Defendants' breach of contract and Defendants' repudiation of their reclamation responsibilities, Western did report to DOGM that Defendants were conducting tests on some of the unpermitted heaps and that Western objected to Defendants' actions. This caused Defendants' testing by sprinkling on those heaps to be shut down. Given the prior anticipatory repudiation of the contract by Defendants, this conduct by Western is neither an actionable breach of contract or a breach of contract.

Western has presented evidence in support of its claim for damages for breach of contract. That evidence was presented through the testimony of John Carmody, Western's Vice President in charge of administration and accounting, and through Exhibit 97A through E. Mr. Carmody testified to approximately \$142,000 in damages consisting of: fees paid by Western to attorneys representing Western in administrative matters before the Utah mining authorities; miscellaneous expenses described as related to those matters and efforts to resolve the dispute over reclamation with Utah authorities; and labor costs to Western States. With the exception of damages claimed for Western's payments of reclamation bond premiums from the date of closing in October 1988 to the present, the Court disallowed the evidence of these damages on

Defendants' motion at the conclusion of the trial. The Court concluded that although evidence of payment of the bills to attorneys may be some evidence of reasonableness, the Court was not persuaded that it is reasonable to allow those items as damages when the Western timeslips included charges in 8 hour increments and attorney fees included multiple attorneys billing for the same work. As to the remainder of the damages claimed, the Court finds no evidence establishing that those costs and amounts were incurred as a consequence of Defendants' breach or that they were reasonable. Plaintiff failed to establish reasonableness of the attorney fees or the time and fees of Western personnel. As to the remaining area of damages, the bond premiums paid by Western to its insurer for the reclamation bond in Utah, there was not enough definite evidence to establish that the bond premiums can be categorized as damages for the breach of contract that was proven.

The Court makes no findings on the alleged "groundwater problem" or other "buried bodies" to which Mr. King has testified. There is little evidence in the record on the alleged groundwater problem. It was first discovered in 1989. There is no evidence that the parties knew anything about it prior to the time of closing. I do not find the remedying of the groundwater problem to be included within the contracting parties' understanding of the term reclamation. This Order and Judgment therefore does not address it.

### CONCLUSIONS OF LAW

There are unique circumstances in this case which justify the order of specific performance by Defendants.

A court has discretion to order specific performance under a contract where the contract shows that a party is clearly entitled to the relief it seeks, and where a remedy at law is inadequate. Hill v. Chambers, 136 Colo. 129, 314 P.2d 707 (1957). Western has shown its entitlement to this relief, and Defendants shall be required to perform all contract obligations to assume all reclamation at the Drum Mine site, specifically including undertaking the bonding requirements imposed by the appropriate public authorities in the state of Utah.

A party to a contract who repudiates the contract before the time when his performance is to be completed commits a breach of the contract. Repudiation will give rise to a claim for breach of contract when the repudiating party shows, by words or conduct, or both, a clear and definite intention not to perform the contract. 4 A. Corbin, Contracts, § 959 (1951); Restatement 2d, Contracts, § 250 (1981). Defendants clearly repudiated and breached their contract with Western when they stated to Western and to the Utah authorities that they did not intend to be responsible for all reclamation at the mine, notwithstanding their contractual obligation to accept all reclamation obligations.

The party committing the first substantial breach of contract has no right to complain of subsequent breaches by the other party

thereto. Scientific Packages, Inc. v. Gwinn, 134 Colo. 233, 301 P.2d 719 (1956). Defendants committed the first and only breach in this case by telling Western and Utah DOGM that Defendants would not assume all reclamation obligations, by urging only a partial permit transfer, and by refusing to take those actions necessary to allow a transfer of the complete operating permit for the Drum Mine. This obligation included accepting and bonding for all reclamation including the unpermitted heaps and the topsoil deficiency.

Every contract contains an implied duty of good faith and fair dealing. Restatement 2d, Contracts, § 205 (1981). A claim for breach of this covenant is a claim for money damages, and because no money damages are being awarded for Defendants' breach, there can be no recovery for the breach of the covenant of good faith and fair dealing.

An agent acting on behalf of a disclosed principal cannot be held personally liable for breaches of contract. Fink v. Montgomery Elevator Company, 161 Colo. 342, 421 P.2d 735 (1966). The evidence was insufficient to establish that Ed King was a party to the contract, and this being a necessary element of Western's claims against him for breach of contract, Western's claims against Mr. King cannot be established.

#### ORDERS

IT IS ORDERED AND ADJUDGED that as to Western's first claim for injunctive relief, that claim is moot and has been withdrawn by

Western. The Court has found for Western and against the Defendants on the second claim for relief for reformation. and judgment entered on this claim on February 23, 1993, nunc pro tunc to January 27, 1993. As to Western's third claim for relief, breach of contract - damages, the Court finds for Defendants and against Western for failure to establish money damages as discussed above. On Western's fourth claim for relief, breach of contract - specific performance - this Court finds for Western and against Defendants and specifically Orders that Defendants, ASOMA and Jumbo, are to forthwith perform all contract obligations to assume all reclamation at the Drum Mine; this obligation includes undertaking forthwith whatever bonding requirements are required by the appropriate authorities in the State of Utah to effectuate the clear purpose of this contract, which is that Defendants assume all reclamation responsibilities. As to Western's fifth claim for relief for the breach of the covenant of good faith and fair dealing, the Court finds for Defendants and against Western for the same reasons related to the failure to establish money damages in connection with the third claim for relief.

On Defendants' counterclaims for breach of contract, the Court finds for Western and against Defendants, there having been an anticipatory repudiation and breach of the contract by Defendants in April 1989. Judgment enters against the Defendants Jumbo and ASOMA.

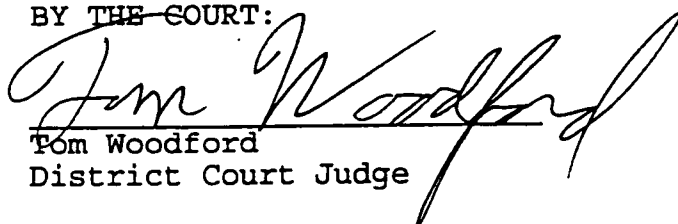


All claims against Ed King in his individual capacity are dismissed.

Western shall perform all of its contractual obligations, including its obligations to transfer to ASOMA all permits necessary to operate the Drum Mine and to execute and deliver to ASOMA and Jumbo all documents that might reasonably be required to do so.

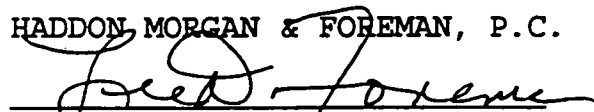
DONE AND SIGNED this 16<sup>th</sup> day of May, 1994.

BY THE COURT:

  
Tom Woodford  
District Court Judge


APPROVED AS TO FORM:

HADDON MORGAN & FOREMAN, P.C.

  
Lee D. Foreman, #2567  
Rachel A. Bellis, #12723  
150 East 10th Avenue  
Denver, CO 80203  
(303) 831-7364

Counsel for Plaintiff  
Western States Minerals  
Corporation

Z. LANCE SAMAY

  
Z. Lance Samay  
One Washington Street  
Post Office Box 130  
Morristown, NJ 07963  
(201) 540-1133

William E. Mooz, Jr.  
Holland & Hart  
555 Seventeenth Street  
Suite 2900  
Denver, CO 80202  
(303) 290-1600

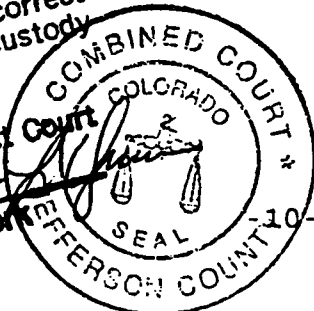
Counsel for Defendants  
ASOMA (Utah) Inc.,  
Jumbo Mining Company and  
Edwin B. King

DISTRICT COURT  
County of Jefferson, Colorado  
Certified to be full, true and correct copy  
of the original in my custody

Clerk of the District Court

By 

Deputy Clerk







State of Utah  
DEPARTMENT OF NATURAL RESOURCES  
DIVISION OF OIL, GAS AND MINING

Michael O. Leavitt  
Governor

Ted Stewart  
Executive Director

James W. Carter  
Division Director

825 West North Temple  
3 Triad Center, Suite 300  
Salt Lake City, Utah 84180-1203  
801-538-5340  
801-358-3949 (Fax)  
801-538-3315 (TDD)

July 10, 1995

CERTIFIED RETURN RECEIPT  
P 074 978 934

E. B. King  
Jumbo Mining Company  
6305 Fern Spring Cove  
Austin, Texas 78730

Re: Topsoiling Deficiency Resolution & Interim Reclamation Surety, Jumbo Mining Company, Drum Mine, M/027/007, Millard County, Utah

Dear Mr. King:

Please accept our apology for the unforeseen delay in providing a more timely response to your recent topsoil replacement proposal. On March 9, 1995, Division and BLM staff met with Mr. Dave Hartshorn of Jumbo Mining Company (JMC) to perform a joint site inspection of the Drum Mine site. The inspection was conducted to evaluate several proposed topsoil borrow areas that JMC has identified to resolve the outstanding topsoil permitting deficiency.

During our inspection of the proposed borrow areas, it became evident that a sufficient volume of substitute topsoil material is available to make up the permitting deficiency. Mr. Hartshorn indicated he did not determine whether more than the required 55,000 cu. yd. volume of topsoil material was available. He agreed there is probably more topsoil material available from the borrow sites than what is presently required. Because it is unclear whether the existing heaps and associated disturbed areas were actually constructed as originally designed and approved under Western States Minerals Company's (WSMC) permit, it is possible that additional topsoil material may ultimately be needed to successfully reclaim the mine site disturbances. Accordingly, the Division encourages JMC to consider stockpiling additional topsoil material to assist in their final reclamation efforts. The Division and BLM jointly support the use of the proposed topsoil borrow areas for JMC's use in making up the topsoil deficiency.

As a condition to our approval of the topsoil borrow areas, the Division will require JMC to clearly mark/identify the borrow areas on the ground such that there will be little

Page 2  
E. B. King  
M/027/007  
July 10, 1995

chance that the borrow areas will be adversely impacted during the continued period of suspended operations. Before beginning mining and processing operations that could potentially impact the borrow areas, the substitute topsoil material must be stripped and stockpiled.

An updated surface facilities map must be provided identifying where the salvaged topsoil material will be placed. The map should be labelled with the approximate volume of topsoil in each stockpile. Upon final reclamation of the mine site, all stockpiled topsoil material must be analyzed for the following constituents to determine basic soil fertility and the need for soil amendments: Texture, % Organic matter, pH, Nitrogen, Phosphorus, and Potassium. The results of the analytical tests will determine which soil amendments may be required to enhance the soil fertility and revegetative success.

The Division agreed to provide Jumbo Mining Company with a written assessment of our findings following our onsite inspection. We have also evaluated your draft reclamation cost estimate for stripping and stockpiling this borrow/topsoil material. A preliminary *interim* reclamation surety estimate has been prepared (see attachment). This estimate is based upon an escalation of the original approved WSMC surety estimate and JMC's subsequent supplemental permitting amendments to the Drum Mine permit.

The original WSMC estimate has been escalated from 1984 through 1994 using actual Means Historic Cost Indices. Escalation adjustments have also been made to JMC's 1989 reclamation estimates, which involve other areas that were permitted or proposed to be included under the existing Drum Mine permit. A five year future escalation of the calculated 1995 interim surety amount totals \$425,200 (year 2000 dollars). *The Division and BLM reserve the right to increase or decrease this interim surety amount as pertinent circumstances, permitting conditions and/or mine plan modifications require requisite surety adjustments.*

In a March 23, 1992 response letter, JMC agreed to a stipulation/condition contained in DOGM's January 14, 1992 - 2nd technical review of the Mizpah Pit and New Heap permit amendments. The condition required JMC to provide an updated, reformatted and consolidated mining and reclamation plan/permit application. This updated plan would include all previous and subsequently approved Drum Mine permit revisions and amendments, within 6 months following DOGM's approval of the New Heap and Mizpah Pit permit amendments. On August 3, 1992, DOGM issued a conditional tentative approval for both amendments. To date, we have not received a sufficient response from JMC which would enable us to issue our final approval of these amendments. Therefore, these amendments remain unapproved.

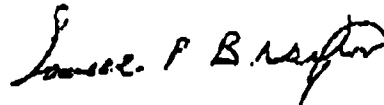
Page 3  
E. B. King  
MU027/007  
July 10, 1995

Enclosed is a new permit transfer form that will need to be signed by JMC and Western States Minerals Company (WSMC), notarized and returned to the Division. The new form will affectively transfer all of the remaining permitting and reclamation responsibilities for the entire Drum Mine property from WSMC to JMC. The transfer form cannot be approved by the Division until a replacement surety is approved by the Board of Oil, Gas and Mining.

A new Reclamation Contract (FORM MR-RC) will need to be completed and returned along with the new surety. A copy of this form is enclosed. Please let us know what form of surety you wish to post, so that the appropriate surety forms can be sent to you. Because of the federal lands involved, the reclamation surety will need to be made jointly payable to Utah Department of Natural Resources, DOGM and the U.S. Department of the Interior, BLM.

Thank you for your patience and cooperation in completing this permitting action. Please contact me or D. Wayne Hedberg of the Minerals staff if you have questions or concerns in this regard.

Sincerely,



Lowell P. Braxton  
Associate Director, Mining

jd

Attachment: reclamation surety estimate

Enclosures: FORM MR-TRL, FORM MR-RC & Guideline

pc (w/attachment):

Rody Cox, BLM, Warm Spring RA

Lee Foreman, WSMC counsel

David Hartshorn, Jumbo - Drum Mine

Don Ostler, DWQ

MU027007.tps

RECLAMATION ESTIMATE Jumbo Mining Company DRAFT  
Drum Mine [entire site]

last revision [redacted] page "COULBO"

M/027/007 Millard County filename DRUMS2.WC2

Prepared by Utah State Division of Oil, Gas & Mining

Details of Final Reclamation

- This mine site was previously split into two permits with separate reclamation sureties
- Western States Minerals Co. had a bond covering 42 acres in the amount of \$264,080
- Jumbo had a separate bond covering 84 + 11 acres in the amount of \$162,000
- Western States' entire bond was retained until a topsoil deficiency could be resolved
- A Colorado Court ruling required Jumbo to assume responsibility for the entire site
- This estimate adjusts all previous DOGM estimates to be in current dollars and then escalates the current subtotal for five years into the future
- This estimate includes recent topsoil survey information as resolving the topsoil deficiency
- This estimate does not include the proposed amendment of Heap 2LG & 7 into Jumbo's plan
- WSMC'S portion of Drum Mine-LG1/LG2/LG3/HG6/HG7/WASTE 10.6/WASTE 3.6/WASTE 5.2
- This estimate ASSUMES WSMC's site responsibility is correct in the DOGM May 22, 1989 estimate
- DOGM has adjusted the May 22, 1969 estimate to account for 55,000 CY of topsoil replacement

-Jumbo portion of Drum Mine-HG1/HG2/HG3/HG4&5/NORTH RIDGE PIT/SOUTHERN EXTENSION PIT/  
WASTE DUMP 1.5/POWDER MAGAZINE/TRUCK POND/TOPSOIL STOCKPILE/SOLUTION PONDS;  
OFFICE/OIL STATION/WATER TANK: \$130,230 1989-\$

-Jumbo - Alto/Keystone/Monarch/lbex: \$16,290 1988-\$

-Jumbo -Mizpah Pit: \$33,358 1992-\$; AND New Heap \$50,401 1992-\$ == > \$83,759 1992-\$

-Escalation factors through 1994 are actual Means Historical Cost Indices

WSMC'S PORTION OF ORIGINAL ENTIRE SITE

DOGM ADJUSTED EST. \$96,329

-Total disturbed area =  
CALCULATIONS

YR	42.00 ACRES ESCAL FACTOR	BOND AMOUNT
1985	0.0290	\$0
1986	0.0210	\$0
1987	0.0195	\$0
1988	0.0181	\$0
1989	0.0177	\$96,329
1990	0.0077	\$97,071
1991	0.0127	\$98,304
1992	0.0221	\$100,476
1993	0.0261	\$103,098
1994	0.0321	\$106,408
1995	0.0268	\$109,260
1996	0.0268	\$112,188
1997	0.0268	\$115,194
1998	0.0268	\$118,282
1999	0.0268	\$121,452
2000	0.0268	\$124,707

$$F = P(1 + i)^{n}$$

F = Future Sum

P = Present Sum

i = Escalation Factor

n = Number of periods

Three Yr Average = 2.68%

Used to Project 5 Yrs

into the Future

From the Year 1995

Updated Surety Amount Rounded (2000 \$)

Average cost per acre =

\$124,700  
2,969 (\$/ACRE)

JUMBO'S PORTION OF ENTIRE SITE

1989-\$ \$130,230

-Total disturbed area =

YR	83.90 ACRES ESCAL FACTOR	BOND AMOUNT
1985	0.0290	\$0
1986	0.0210	\$0
1987	0.0195	\$0
1988	0.0181	\$0
1989	0.0177	\$130,230
1990	0.0377	\$131,233
1991	0.0127	\$132,899
1992	0.0221	\$135,837
1993	0.0261	\$139,382
1994	0.0321	\$143,856
1995	0.0268	\$147,711
1996	0.0268	\$151,670
1997	0.0268	\$155,735
1998	0.0268	\$159,908
1999	0.0268	\$164,194
2000	0.0268	\$168,594

Updated Surety Amount Rounded ( \$169,600  
Average cost per acre = 2010 (\$/ACRE)

JUMBO-ALTO/KEYSTONE/MONARCH/IBEX

1988-\$ \$16,290

-Total disturbed area =  
CALCULATIONS

YR	11.00 ACRES	
	ESCAL FACTOR	BOND AMOUNT
1988	0.0181	\$16,290
1989	0.0177	\$16,578
1990	0.0077	\$16,706
1991	0.0127	\$16,918
1992	0.0221	\$17,292
1993	0.0261	\$17,743
1994	0.0321	\$18,313
1995	0.0268	\$18,804
1996	0.0268	\$19,308
1997	0.0268	\$19,825
1998	0.0268	\$20,356
1999	0.0268	\$20,902
2000	0.0268	\$21,462

$$F = P(1 + I)^{n-1}$$

F = Future Sum

P = Present Sum

I = Escalation Factor

n = number of periods

Three Yr Average = 2.68%

Used to Project 5 Yrs

Into the Future

From the Year 1995

Updated Surety Amount Rounded (2000 \$)

Average cost per acre =

\$21,500  
1.955 (\$/ACRE)

COMBINED TOTAL IN 2000-\$ IS

\$425,200

JUMBO-MIZPAH PIT & NEW HEAP

1982-\$ \$83,759

-Total disturbed area =  
CALCULATIONS

YR	36.40 ACRES	
	ESCAL FACTOR	BOND AMOUNT
1988	0.0181	\$83,759
1989	0.0177	\$85,242
1990	0.0077	\$85,898
1991	0.0127	\$86,969
1992	0.0221	\$88,911
1993	0.0261	\$91,232
1994	0.0321	\$94,160
1995	0.0268	\$96,684
1996	0.0268	\$99,275
1997	0.0268	\$101,936
1998	0.0268	\$104,667
1999	0.0268	\$107,473
2000	0.0268	\$110,353

Updated Surety Amount Rounded ( \$110,400  
Average cost per acre = 3.033 (\$/ACRE)

CERTIFICATION OF APPROVAL

This is to certify that I have examined the foregoing application and do hereby grant the same, subject to the following limitations and conditions:

- (a) This transfer of notice of intention grants only the right to affect the lands described in Appendix "A".
- (b) The transferee has provided to the Division a fully executed and signed Reclamation Contract (Form MR-RC). The surety shall be effective on the date of transfer.
- (c) The transferee, or such other person as required by UCA 1953, Title 40-8, has acquired legal right to mine for lands described in Appendix "A".

COMMENTS:

Additional Conditions of Transfer - See Attachment 1

APPROVED:

Donna R. Nelson  
(Signature)

Director, Division of Oil, Gas and Mining

Effective Date:  
NOI No.:

8/4/89  
7/027/007

APPROVED AS TO FORM:

Robert W. Lohr  
(Signature)

Assistant Attorney General



**ATTACHMENT 1**

**Transfer of Notice of Intention No. M/027/007  
Certification of Approval  
Conditions of Transfer**

**July 25, 1989**

**Conditions of Transfer (continued)**

- (d) The Division will continue to hold the Transferor responsible for the reclamation of approximately 42 acres of existing Drum Mine surface disturbance, as delineated in Appendix A.**
- (e) The Division will hold the Transferee responsible for the reclamation of approximately 84 acres of existing Drum Mine surface disturbance, as delineated in Appendix A.**
- (f) The Transferor will retain responsibility for resolving the topsoil deficiency issue.**
- (g) The Transferee's 84 acre Drum Mine reclamation responsibility includes posting a reclamation surety of \$143,000, based on reclamation calculations from Appendix A information.**
- (h) An additional 11 acres of surface disturbance will be approved as an amendment to the Drum Mine permit. The Transferee will provide an additional \$19,000 reclamation surety amount for the proposed amendment (Drum Mountain Project).**
- (i) The Division will retain possession of the Transferor's \$264,080 reclamation surety bond, until the topsoil deficiency issue and the question of ultimate Drum Mine reclamation responsibility between the Transferor and Transferee is resolved.**
- (j) Resolution of the reclamation responsibility question may ultimately require an additional adjustment to the Transferee's reclamation surety amount.**

**jb  
MN3/52**

**E0000587**

## APPENDIX "A"

Western States will reclaim these areas (418 acres.)

**Jumbo Mining will reclaim remaining areas (B3) (B4) (B5) (B6) (B7) (B8) (B9) (B10) (B11) (B12) (B13) (B14) (B15) (B16) (B17) (B18) (B19) (B20) (B21) (B22) (B23) (B24) (B25) (B26) (B27) (B28) (B29) (B30) (B31) (B32) (B33) (B34) (B35) (B36) (B37) (B38) (B39) (B40) (B41) (B42) (B43) (B44) (B45) (B46) (B47) (B48) (B49) (B50) (B51) (B52) (B53) (B54) (B55) (B56) (B57) (B58) (B59) (B60) (B61) (B62) (B63) (B64) (B65) (B66) (B67) (B68) (B69) (B70) (B71) (B72) (B73) (B74) (B75) (B76) (B77) (B78) (B79) (B80) (B81) (B82) (B83) (B84) (B85) (B86) (B87) (B88) (B89) (B90) (B91) (B92) (B93) (B94) (B95) (B96) (B97) (B98) (B99) (B100) (B101) (B102) (B103) (B104) (B105) (B106) (B107) (B108) (B109) (B110) (B111) (B112) (B113) (B114) (B115) (B116) (B117) (B118) (B119) (B120) (B121) (B122) (B123) (B124) (B125) (B126) (B127) (B128) (B129) (B130) (B131) (B132) (B133) (B134) (B135) (B136) (B137) (B138) (B139) (B140) (B141) (B142) (B143) (B144) (B145) (B146) (B147) (B148) (B149) (B150) (B151) (B152) (B153) (B154) (B155) (B156) (B157) (B158) (B159) (B160) (B161) (B162) (B163) (B164) (B165) (B166) (B167) (B168) (B169) (B170) (B171) (B172) (B173) (B174) (B175) (B176) (B177) (B178) (B179) (B180) (B181) (B182) (B183) (B184) (B185) (B186) (B187) (B188) (B189) (B190) (B191) (B192) (B193) (B194) (B195) (B196) (B197) (B198) (B199) (B200) (B201) (B202) (B203) (B204) (B205) (B206) (B207) (B208) (B209) (B210) (B211) (B212) (B213) (B214) (B215) (B216) (B217) (B218) (B219) (B220) (B221) (B222) (B223) (B224) (B225) (B226) (B227) (B228) (B229) (B230) (B231) (B232) (B233) (B234) (B235) (B236) (B237) (B238) (B239) (B240) (B241) (B242) (B243) (B244) (B245) (B246) (B247) (B248) (B249) (B250) (B251) (B252) (B253) (B254) (B255) (B256) (B257) (B258) (B259) (B260) (B261) (B262) (B263) (B264) (B265) (B266) (B267) (B268) (B269) (B270) (B271) (B272) (B273) (B274) (B275) (B276) (B277) (B278) (B279) (B280) (B281) (B282) (B283) (B284) (B285) (B286) (B287) (B288) (B289) (B290) (B291) (B292) (B293) (B294) (B295) (B296) (B297) (B298) (B299) (B300) (B301) (B302) (B303) (B304) (B305) (B306) (B307) (B308) (B309) (B310) (B311) (B312) (B313) (B314) (B315) (B316) (B317) (B318) (B319) (B320) (B321) (B322) (B323) (B324) (B325) (B326) (B327) (B328) (B329) (B330) (B331) (B332) (B333) (B334) (B335) (B336) (B337) (B338) (B339) (B340) (B341) (B342) (B343) (B344) (B345) (B346) (B347) (B348) (B349) (B350) (B351) (B352) (B353) (B354) (B355) (B356) (B357) (B358) (B359) (B360) (B361) (B362) (B363) (B364) (B365) (B366) (B367) (B368) (B369) (B370) (B371) (B372) (B373) (B374) (B375) (B376) (B377) (B378) (B379) (B380) (B381) (B382) (B383) (B384) (B385) (B386) (B387) (B388) (B389) (B390) (B391) (B392) (B393) (B394) (B395) (B396) (B397) (B398) (B399) (B400) (B401) (B402) (B403) (B404) (B405) (B406) (B407) (B408) (B409) (B410) (B411) (B412) (B413) (B414) (B415) (B416) (B417) (B418) (B419) (B420) (B421) (B422) (B423) (B424) (B425) (B426) (B427) (B428) (B429) (B430) (B431) (B432) (B433) (B434) (B435) (B436) (B437) (B438) (B439) (B440) (B441) (B442) (B443) (B444) (B445) (B446) (B447) (B448) (B449) (B450) (B451) (B452) (B453) (B454) (B455) (B456) (B457) (B458) (B459) (B460) (B461) (B462) (B463) (B464) (B465) (B466) (B467) (B468) (B469) (B470) (B471) (B472) (B473) (B474) (B475) (B476) (B477) (B478) (B479) (B480) (B481) (B482) (B483) (B484) (B485) (B486) (B487) (B488) (B489) (B490) (B491) (B492) (B493) (B494) (B495) (B496) (B497) (B498) (B499) (B500) (B501) (B502) (B503) (B504) (B505) (B506) (B507) (B508) (B509) (B510) (B511) (B512) (B513) (B514) (B515) (B516) (B517) (B518) (B519) (B520) (B521) (B522) (B523) (B524) (B525) (B526) (B527) (B528) (B529) (B530) (B531) (B532) (B533) (B534) (B535) (B536) (B537) (B538) (B539) (B540) (B541) (B542) (B543) (B544) (B545) (B546) (B547) (B548) (B549) (B550) (B551) (B552) (B553) (B554) (B555) (B556) (B557) (B558) (B559) (B560) (B561) (B562) (B563) (B564) (B565) (B566) (B567) (B568) (B569) (B570) (B571) (B572) (B573) (B574) (B575) (B576) (B577) (B578) (B579) (B580) (B581) (B582) (B583) (B584) (B585) (B586) (B587) (B588) (B589) (B590) (B591) (B592) (B593) (B594) (B595) (B596) (B597) (B598) (B599) (B600) (B601) (B602) (B603) (B604) (B605) (B606) (B607) (B608) (B609) (B610) (B611) (B612) (B613) (B614) (B615) (B616) (B617) (B618) (B619) (B620) (B621) (B622) (B623) (B624) (B625) (B626) (B627) (B628) (B629) (B630) (B631) (B632) (B633) (B634) (B635) (B636) (B637) (B638) (B639) (B640) (B641) (B642) (B643) (B644) (B645) (B646) (B647) (B648) (B649) (B650) (B651) (B652) (B653) (B654) (B655) (B656) (B657) (B658) (B659) (B660) (B661) (B662) (B663) (B664) (B665) (B666) (B667) (B668) (B669) (B670) (B671) (B672) (B673) (B674) (B675) (B676) (B677) (B678) (B679) (B680) (B681) (B682) (B683) (B684) (B685) (B686) (B687) (B688) (B689) (B690) (B691) (B692) (B693) (B694) (B695) (B696) (B697) (B698) (B699) (B700) (B**

E00000588

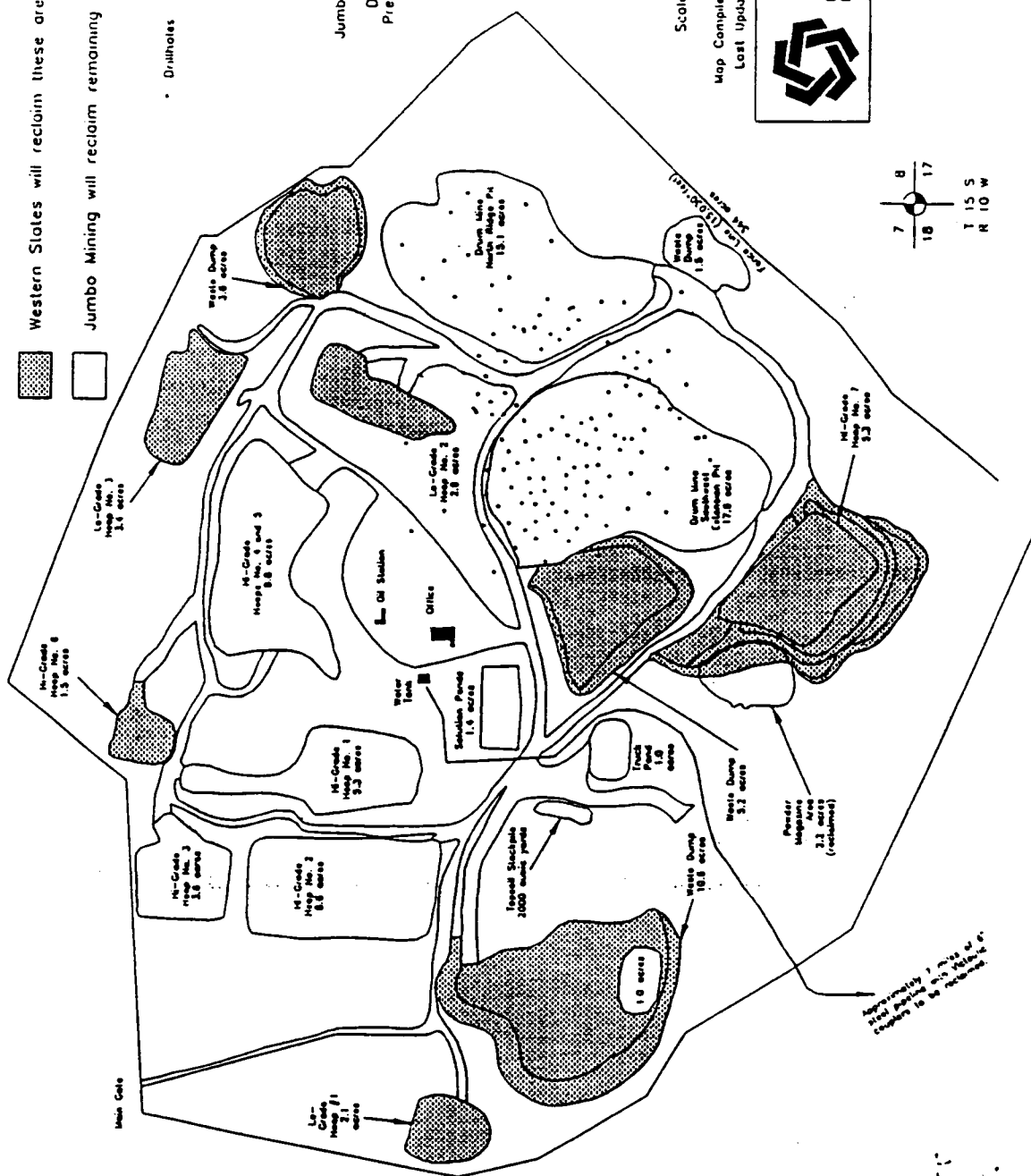
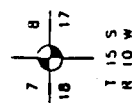
## Drumholes

Jumbo Mining Company  
M/021/007  
Drum Mine Site  
Present Disturbance

Score: 1.1/21025

Map Compiled December 3.

**Last Update:** July 26 1,



**FILED**

AUG 25 1997

SECRETARY, BOARD OF  
OIL, GAS & MINING

BEFORE THE BOARD OF OIL GAS & MINING  
DEPARTMENT OF NATURAL RESOURCES  
STATE OF UTAH

---

In Re Petition Filed by the	:	RESPONSE OF JUMBO MINING
Division of Oil, Gas & Mining	:	COMPANY TO DOGM PETITION
for an Order Requiring Immediate	:	AND NOTICE OF AGENCY ACTION
Reclamation of the Drum Mine in	:	
Millard County, Utah By Western	:	
States Minerals Corporation and	:	Docket No. 97-009
Jumbo Mining Company.	:	Cause No. M/027/007

---

Pursuant to the Pre-Hearing Scheduling and Discovery Order entered in the above-entitled matter by the State of Utah Board of Oil, Gas & Mining ("the Board") on May 1, 1997 ("the Scheduling Order") and amended, on June 25, 1997, by the First Amendment to Pre-Hearing Scheduling and Discovery Order and, on July 2, 1997, by the Stipulation, Motion and Order For Second Amendment To Pre-Hearing Scheduling and Discovery Order (collectively, "the Amended Scheduling Order") and, in accordance with Rule 641-104-100, et seq. of the Utah Administrative Code, Respondent JUMBO MINING COMPANY ("Jumbo"), by and through its undersigned attorneys, hereby responds as follows to the petition of the State of Utah Division of Oil, Gas & Mining (alternatively, "the Division" or "DOGM") that is set forth in the Notice Of Agency Action dated and filed April 10, 1997 ("the petition"):

PRELIMINARY STATEMENT

In order to prevail upon its petition to require respondents

to reclaim the Drum Mine, DOGM must prove that mining operations at the Drum Mine have been suspended for a continuous period of at least five (5) years. See R647-4-117.4. Moreover, in order to proceed formally before this Board, DOGM must show that the conversion of these proceedings are in the public interest and that the proceeding will not unfairly prejudice the rights of any party.<sup>1</sup> See R647-5-105.1.11 and 1.12. It is respectfully submitted that DOGM cannot meet such burdens as a matter of fact and law.

In this regard, Jumbo denies each and every allegation made in DOGM's petition which asserts or implies that mining activities at the Drum Mine have been continuously suspended for more than five years past, that the Drum Mine cannot meet regulatory requirements for "operation" in its present state, that the conversion of these proceedings is in the public interest, and that the proceeding will not unfairly prejudice the rights of any party.

Moreover, Jumbo respectfully maintains that DOGM's petition has failed to even suggest any evidence that would justify reclaiming the Drum Mine at this time, or to invite the Board's

---

<sup>1</sup> Other than its bald assertion to this effect, DOGM has presented no legally cognizable basis for its conclusions. Contrary to its assertion, the public will not benefit from the conversion of the informal process to a formal hearing and the parties will be unfairly prejudiced. Taxpayer money will be spent needlessly on the hearing process and the parties will incur substantial expenses to contest this formal action. These expenses are entirely unwarranted and will amount to a significant portion of the total reclamation costs.

attention to any applicable rule or regulation that would require or even arguably justify the urged "expeditious<sup>2</sup> resolution of this matter," particularly in the face of the clearly demonstrable eventuality that Jumbo will thereby sustain a loss of millions of dollars and that the State of Utah and the surrounding community could possibly sustain an even greater loss. If this Board were to order reclamation at this time, it is certain that Jumbo would lose buildings, equipment, earthworks and related infrastructure having a value of approximately one million dollars and, as will be evident from the discussion below, available gold ore reserves of many millions more.

#### STATEMENT OF FACTS

Contrary to the unfounded assertions made by DOGM, mining activities at the Drum Mine have not been "in a state of suspension" or "cessation" since October 1, 1990. See Statement of the Case, Petition at 2 and paragraph 10. Although it is true that

---

<sup>2</sup> Even assuming a proper basis for reclamation, which does not exist here, there is no law or any applicable regulation which requires, as DOGM urges in its Statement of the Case, that a mine must be "imminently returned to an active state." See Statement of the Case, Petition at 2. Many mines have been forced to reduce their scale of operation for years, as dictated by market conditions, legal considerations, or other events. Nowhere in the regulations has this kind of reduction in scale of operation or activity been deemed to be a cause for destruction of the mining equipment and infrastructure which is required by reclamation. To the contrary, DOGM's own regulations contemplate a ten-year period of suspension of mining operations, plus possible additional time to allow for "unusual circumstances." See R647-4-117.4.

heap leaching activities at the Drum Mine were suspended on October 1, 1990, it is not true that "mining activities" were then suspended; neither is it true that "mining activities have remained suspended" since that time.<sup>3</sup> See Petition, at ¶10. Notwithstanding the cessation of heap leaching, Jumbo has actively engaged, without interruption, in other "mining activities" since October 1990, including without limitation, surface and underground exploration and development. In addition, Jumbo is in the process of applying for a new heap leach permit, and will post additional reclamation bonding for additional mining areas at the appropriate time.

During every year since October 1990, Jumbo has been active in surface and underground exploration and development. Backhoes and bulldozers have been used to conduct exploration and development, to dig pits for exploration purposes and to locate and sample for the clay which will be required for the construction of a new heap, as well as for the accumulation of the topsoil that will be required for reclamation purposes. During this period, Jumbo has

---

<sup>3</sup> In large measure, the cessation of heap leaching activities arose out of a contract dispute over reclamation responsibility between Jumbo and Western which has been the subject of very active, costly and on-going litigation in the Colorado Courts, including two phases of a bifurcated trial, cross-appeals, and cross-petitions for certiorari which are now pending decision in the Supreme Court of Colorado. But for the subjects of this litigation, heap leaching would, more than likely, have been conducted by Jumbo from October, 1990 to the present. Hopefully, after the imminent conclusion of this litigation, Jumbo will be able to resume its heap leaching activities at the Drum Mine.



drilled a total of approximately 170 exploration holes and assayed an estimated 5,000 samples for gold and other elements. All throughout this period, Jumbo has also engaged in extensive on-site drilling, sampling and pilot-scale metallurgical testing of samples, mapping, geophysical work, and other "mining operations" normal to "exploration" and "development" activities as defined by DOGM's own regulations. See R647-I-106.

Prior to the cessation of heap leaching in 1990, Jumbo paid a million dollars for the Drum Mine and spent several hundred thousand dollars more on building haulage roads, stripping waste preparatory to mining new ore, and engineering efforts aimed at obtaining permits for old heaps, and for the construction of new heaps. A pilot leaching test of more than 55,000 tons of new, crushed ore was conducted to verify gold recoveries. Western had not previously crushed the ore prior to leaching, and, as a consequence, nearly one-half of the gold originally in the ore remains unleached from the boulders and blind spots in the old heaps. In light of these considerations, despite what amounted to a forced and expensive<sup>4</sup> shut-down of its heap leaching activities, Jumbo continued to actively engage in all other permissible mining operations at the Drum Mine.

As a result of this work, significant additional gold ore

---

<sup>4</sup> As a result of the shut-down, Jumbo did not receive expected revenues. Rather, it incurred literally millions of dollars of expenses in holding costs and litigation expenses which have all but exhausted Jumbo's operating capital resources.

reserves have been discovered or inferred which will be sufficient to insure a more than viable future operation at the Drum Mine. More specifically, the recovery of more than 35,000 ounces of gold (\$12 million gross value, if sold forward at today's prices, near \$350 per ounce) from newly mined ores, as well as from crushed and reprocessed old heaps, has been assured by the detailed pilot testing, engineering, mining, and economic studies which have been completed during the last several years of Jumbo's uninterrupted and continuous mining operations.

Provided that the existing plant and facilities remain intact<sup>5</sup> and can be utilized as planned, the total cost of recovery of this gold is projected to be in the range of \$200 to \$250 per ounce, including costs of building new heaps and all project reclamation. Start-up awaits only the availability of the operating capital required to build a new heap,<sup>6</sup> to bond for additional reclamation,

---

<sup>5</sup> Among other things, reclamation at this time would cause the unjustifiable destruction of buildings, machinery, equipment, and earthworks, including generators, fuel storage tanks, water and sanitary facilities, which have a replacement value exceeding \$1,000,000. These valuable assets, as well as analytical and ore testing facilities, have been used for and made possible the continued mining operations described above, in the areas of repair and maintenance, engineering, exploration and development. Roads have also been maintained to allow access for drilling and field exploration.

<sup>6</sup> For some time past, Jumbo has been engaged in planning the construction of a new leach heap. In addition to Jumbo's engineers and staff, consultants have been hired to provide the detailed design and engineering work required by DWQ for a permit for a new heap large enough to hold the new gold ore reserves. This project is within a few weeks of being finished.



and to mine and crush the first 100,000 tons of ore. Thereafter, the operation will provide a very healthy cash flow from sales of the gold recovered. Jumbo anticipates that this operating capital will become available reasonably soon after the conclusion<sup>7</sup> of the pending litigation with Western.

In addition to the foregoing "mining operations," for the last five years Jumbo has continuously employed a watchman/mechanic on the property to patrol the Drum Mine and to maintain Jumbo's equipment.

Jumbo has also paid substantial property taxes, claim fees and lease royalties, in excess of \$1 million, to various public agencies and land/lease owners in order to preserve intact all of the components required for a viable future operation.

Since 1990, Jumbo has also demonstrably improved the environment at the site, including, without limitation, the following specific areas:

- a) removal of buried fuel tanks left behind by Western, and certification thereof by competent authorities;

- b) removal and/or approved disposal of old fuel and reagent drums left behind by Western;

- c) sampling of existing disposal pits to prove that no hazardous wastes have been buried on the property by Jumbo, and

---

<sup>7</sup> Experience has shown that most investors are not interested in investing in a small gold mine which is embroiled in litigation.

characterization and removal, where indicated, of other wastes left behind by Western;

d) removal of thousands of feet of old pipes from heaps, preparatory to reprocessing and/or reclamation. This type of cleanup is continuing where needed for all facilities which will not be used in the future;

e) cementing of drill holes in areas where no future mining was planned; and

f) reclamation of areas on which no future mining was planned. This included final clean up, recontouring, replacement of topsoil, and reseeding in the Monarch, Clara B, and Joy mining areas.

During the temporary shut-down of heap leaching at the Drum Mine, Jumbo has taken every reasonable action within its capabilities to preserve, maintain, and improve the gold recovery plant, facilities and ore reserves which it purchased from Western.<sup>8</sup>

Further, Jumbo has taken appropriate measures to insure that there has been no degradation of the environment. Notwithstanding DOGM's erroneous suggestions to the contrary, there is no evidence whatsoever of environmental degradation; nor is there any reasonable expectation that any environmental degradation or hazard

---

<sup>8</sup> Exclusive of extant gold ore reserves, the buildings, equipment and infrastructure have a value of approximately one million dollars.

will occur if reclamation were to be delayed until the expected resumption of heap leaching at the Drum Mine.

Also contrary to the suggestions made by DOGM, there exists no evidence that Jumbo's existing operations interfere, in any way, with the limited public recreational use of this remote area. In point of fact, by maintaining access roads, Jumbo's on-going mining operations have assisted in public access to this area.

With respect to wildlife habitat, there is also no evidence to suggest that Jumbo's existing operations do anything but nurture the wildlife of the area, by maintaining water holes in this arid region and by preventing overgrazing by sheep of the areas within the Drum Mine's perimeter fences. This difference in vegetation is readily visible to any visitor who would take note of it.

In summary, Jumbo has continued without interruption since October 1990 to conduct, responsibly, a wide range of "mining activities" at the Drum Mine, other than heap leaching, all of which activities are specifically encompassed by DOGM's own definition of "mining operations." See R647-4-117.1.& 2. Indeed, it was precisely because of the conduct of such operations and the temporary nature of the suspension of heap leaching that Jumbo never made application for "an extended suspension period" as contemplated by R647-3-112. Moreover, DOGM never suggested that Jumbo should make such an application, nor that such an application



would be necessary. In fact, in all respects, DOGM has consistently dealt with Jumbo as an active mining operation.<sup>9</sup>

#### ARGUMENT

In this case, DOGM has instituted a formal proceeding by a Petition to the Board seeking an order for immediate reclamation of the Drum Mine. Rule 647-5-104 of the Utah Administrative Code sanctions the commencement of *informal* proceedings against a mine or mining operation in the interests of the public welfare. Such action is undertaken by issuing a Notice of Agency Action and its requisites under Rule 647-5-104.2, et seq.

These proceedings can be formalized to expedite the action which DOGM wishes to pursue by petition to the Board in compliance with Rule 647-5-106. Such application to the Board should be entertained under this section only if the following criteria are met: (1) the conversion is in the public interest, and (2) conversion of the proceeding does not unfairly prejudice the rights of any party. Rule 647-5-105.1.11 and 1.12.

The order from DOGM to both JUMBO and Western to reclaim the Drum mine is based on Utah Administrative Code Rule 647-4-117.4. In pertinent part, this rule provides:

---

<sup>9</sup> Jumbo's "mining operations" at the Drum Mine were never suspended. At all times, Jumbo considered the interruption of its heap leaching to be temporary and at all times Jumbo and DOGM dealt with each other in the context of an active, albeit, somewhat impaired mining operation.

Large Mining Operations that have been approved for an extended suspension period will be reevaluated on a regular basis. Additional interim reclamation or stabilization measures may be required in order for a large mining operation to remain in a continued state of suspension. Reclamation of a large mining operation **may**<sup>[10]</sup> be required **after five (5) years of continuous suspension.** The Division will require complete reclamation of the mine site when the suspension period exceeds ten years, unless the operator appeals to the Board prior to the expiration of the ten (10) year period and shows good cause for a longer suspension period. [Emphasis added in bold].

In order for DOGM to succeed in its Petition to the Board, it must prove the continuous absence of "mining operations" for at least five years. Rule 647-4-117.4.

Under the Utah Administrative Code, "Large Mining Operations are defined to mean "mining operations which have a disturbed area of more than five (5) surface acres at any time." Rule 647-1-106.

"Mining operations" are further defined as:

[T]hose activities conducted on the surface of the land for the **exploration for, development of, or extraction of a mineral deposit,** including, but not limited to, surface mining and the surface effects of underground and *in situ* mining; on-site transportation, concentrating, milling, evaporation, and other primary processing. 'Mining operation' does not include: the extraction of sand, gravel, and rock aggregate; the extraction of oil and gas; the extraction of geothermal steam; smelting or refining operations; off-site

---

<sup>10</sup> The rules and regulations of DOGM contemplate mandatory reclamation of a "suspended" property after 10 years, not 5 years; and, even after 10 years, these regulations provide for extensions justified by good cause.

operations and transportation; or reconnaissance activities which will not cause significant surface resource disturbance and do not involve the use of mechanized earth-moving equipment such as bulldozers, or backhoes. [Emphasis added in bold].

Rule 647-1-106. Thus the very definitions of the terms within this rule are instrumental in determining whether there has been compliance with the rule.<sup>11</sup>

"Development" means "the work performed in relation to a deposit following its discovery, but prior to and in contemplation of production mining operations. Development includes, but is not limited to, preparing the site for mining operations; further defining the ore deposit by drilling or other means; conducting pilot plant operations; and constructing roads or ancillary facilities." Emphasis added in bold; Rule 647-1-106.

"Exploration" consists of surface disturbing activities pursued in hopes of discovering deposits or mineral deposits, "delineating the boundaries of a deposit or mineral deposit," and pinpointing specific locations of potential deposits or mineral deposit existence. Id. "Exploration includes, but is not limited

---

<sup>11</sup> To similar effect see 43 CFR 3809.0-5(f) which provides that "Operations means all functions, work, facilities, and activities in connection with prospecting, discovery and assessment work, development, extraction, and processing of mineral deposits locatable under the mining laws and all other uses reasonably incident thereto, whether on a mining claim or not, including but not limited to the construction of roads, transmission lines, pipelines, and other means of access for support facilities across Federal lands subject to these regulations."



to, sinking shafts, tunneling, drilling holes, digging pits or cuts, building roads and other access ways." *Id.*

It is clear that, in accordance with these regulations, nearly all of Jumbo's above-listed activities are "mining operations." As a result, DOGM cannot prevail in its application as a matter of fact and law.

Apart from this fatal flaw, DOGM's order is predicated on Rule 647-4-117.4, which pertains to large mining operations "that have been approved for an extended suspension period." *Id.* Contrary to the provisions of the foregoing regulation, the Drum Mine mining operations have never been suspended for an extended period of time nor have they ever "been approved for an extended suspension period." *See Id.* In order to receive an official "extended suspension" the operator of a mine must, pursuant to Rule 647-4-117.3, give the Division written notice of suspension which is expected to exceed five (5) years. Rule 647-4-117.3. The Division, upon notification, must inspect the property within thirty (30) days and approve of the suspension. *Id.*

None of this ever occurred. Not only did Jumbo not apply for an extended suspension because of a temporary interruption of its heap leaching activity<sup>12</sup>, but, since October, 1990, operations at

---

<sup>12</sup> Since October, 1990, Jumbo has been prevented from actively pursuing its planned leaching activities at the Drum Mine by unexpected and unavoidable circumstances. Leaching was shut down due to Jumbo's inability to get the permission of DOGM to run water sprinkling tests required by DWQ to demonstrate that two leach heaps did not leak, and thus they could not be permitted for

the Drum Mine were continuously and consistently in accord with the legally defined examples of "mining." Exploration and development have been conducted well within the five-year statutory parameters. For example, during every year since October 1990, Jumbo can show that it was active in surface and underground exploration, as well as in previously sanctioned access road development. Additionally, backhoes and bulldozers were used to facilitate this process. Further, Jumbo can also show that its activities also fit the definition of "development" during each of the past several years. Jumbo conducted drilling, sampling and testing of samples, mapping, geophysical work, and other activities normal to the exploration and development activities defined above.

To the extent that the rules of DOGM coincide with those of the BLM, or are superseded by them, Jumbo also maintains that it has never been in a mode of "non-operation" as referenced in

---

extended leaching, despite the fact that Jumbo had posted the full amount of additional reclamation bonding required by DOGM. Ironically, DOGM's position was that since this test sprinkling of water on the heaps was deemed to be "mining operations," Western's concurrence was required before DOGM could give its permission. Western refused to do so, seeking to force Jumbo into agreeing to modify its contract with Western so as to require Jumbo to accept all of Western's prior reclamation responsibilities, including its many and blatant permit violations. Rather than agree to such extortionate terms, and having been deprived of the cash flow from the gold which Jumbo had planned to recover from these two heaps, Jumbo shut down its leaching operations, continued its available mining operations and pursued its legal recourse in the Colorado courts. Now, having previously forced Jumbo to cease its leaching operations, DOGM seeks to force Jumbo to destroy the equipment which it purchased from Western and has not been allowed to use.



federal regulations 43 CFR 3809.3-7. Therefore, an order for reclamation is inappropriate.

In addition, any suggestion that the heaps or mining activity are futile can be shown to be untrue. Implications that the Drum Mine cannot produce sufficiently enough to be considered worthy of remaining open are inaccurate. Two expert opinions, given by professionals with an interest in purchasing portions of the Drum Mine operation will lend testimony that the heaps are, in fact, viable. Thus, forced reclamation of the Drum Mine will severely prejudice Jumbo.

Reclamation at this time would violate the stated intent of section 40-6-1 of the Utah Code, wherein "[i]t is declared to be in the public interest to foster, encourage and promote the development, production and utilization of natural resources . . . in the State of Utah in such a manner as will prevent waste." Reclamation at this time would also cause unjustifiable and completely unnecessary destruction of buildings, machinery, equipment, and earthworks which have a combined value of approximately one million dollars; the loss of untold tax revenue to the local community and the State of Utah; the equally unjustifiable and unnecessary loss of job opportunities to the local inhabitants; and the loss to local merchants of opportunities to sell materials and supplies to an active and going concern, all of which would likely be valued at many millions of dollars.

Furthermore, if reclamation were ordered by the Board, the

costs and delays incident to inevitable administrative and judicial action would be substantial to all concerned. Such further litigation would surely postpone, or worse yet, prevent entirely, Jumbo's anticipated full operation and reclamation of the property, and possibly force Jumbo into bankruptcy. Considering the many problems which will be generated for both the State and Jumbo if the Board were to order immediate reclamation, it should be apparent that this order should be denied. Reclamation at this time would be a costly mistake for all concerned. It would deprive the State of a valuable small business, and the employment and income to be derived therefrom. And it would impose, unfairly, a catastrophic loss on Jumbo.

#### CONCLUSION

For all of the foregoing reasons, Jumbo respectfully requests the Board to deny DOGM's petition.

Respectfully submitted,

HOLLAND & HART LLP,

215 South State Street  
Suite 500  
Salt Lake City, UT 84111-2346  
Telephone No.: 801-595-7800  
Telefax No.: 801-364-9124

DATED: AUGUST 25, 1997  
SALT LAKE CITY, UTAH

BY:

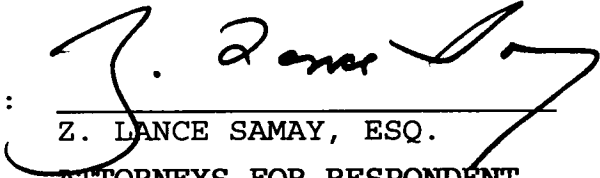
Lawrence J. Jensen  
LAWRENCE J. JENSEN, ESQ., #1682

Z. LANCE SAMAY  
ATTORNEY AT LAW  
A PROFESSIONAL CORPORATION

ONE WASHINGTON STREET  
POST OFFICE BOX 130  
MORRISTOWN, NJ 07963-0130  
TELEPHONE NO.: 973-540-1133  
TELEFAX NO.: 973-540-1020

DATED: AUGUST 25, 1997  
MORRISTOWN, NEW JERSEY

BY:

  
Z. LANCE SAMAY, ESQ.

ATTORNEYS FOR RESPONDENT  
JUMBO MINING COMPANY

JP082597.C1B

Certificate of Service

I hereby certify that on August 25, 1997, I served a copy of the foregoing to the following via hand delivery:

Daniel G. Moquin  
Assistant Attorney General  
3 Triad Center, Suite 475  
Salt Lake City, UT 84180

Thomas A. Mitchell  
Assistant Attorney General  
3 Triad Center, Suite 475  
Salt Lake City, UT 84180

Patrick J. O'Hara  
Assistant Attorney General  
3 Triad Center, Suite 475  
Salt Lake City, UT 84180

H. Michael Keller  
Van Cott, Bagley, Cornwall & McCarthy  
50 S Main, Suite 1600  
Salt Lake City, UT 84144

and via U.S. mail, postage prepaid to the following:

Steven Alfery, Esq.  
Alfers & Carver  
730 17<sup>th</sup> Street, Suite 340  
Denver, CO 80202

  
Candace Johns

**FILED**

AUG 22 1997

SECRETARY, BOARD OF  
OIL, GAS & MINING  
BEFORE THE BOARD OF OIL GAS & MINING  
DEPARTMENT OF NATURAL RESOURCES  
STATE OF UTAH

---

In Re Petition Filed by the	:	RESPONSE OF JUMBO MINING
Division of Oil, Gas & Mining	:	COMPANY TO MOTION FOR
for an Order Requiring Immediate	:	ORDER GRANTING DISCOVERY
Reclamation of the Drum Mine in	:	
Millard County, Utah By Western	:	
States Minerals Corporation and	:	Docket No. 97-009
Jumbo Mining Company.	:	Cause No. M/027/007

---

Pursuant to the notice of hearing issued by the State of Utah Board of Oil, Gas & Mining ("the Board") on August 11, 1997, regarding the motion of WESTERN STATES MINERALS CORPORATION (alternatively, "Western" or "WSMC") for an order to grant discovery ("the motion"), and in accordance with Rules 26 and 34 of the Utah Rules of Civil Procedure, JUMBO MINING COMPANY ("Jumbo"), by and through its undersigned attorneys, hereby responds to the motion as follows:

1. On July 24, 1997, Jumbo received a certified two-page letter ("the letter") from Steven D. Alferts, Esq., of Alferts & Carver, LLC, one of Western's attorneys. A Xerox copy of the letter is attached hereto and made a part hereof as Exhibit 1.

2. The letter, which was dated July 14, 1997, postmarked July 21, 1997 and addressed to Jumbo's President, Edwin B. King, stated, among other things, that "WSMC must gain access to the Drum Mine to take samples of rock, soil and water from the leach pads and waste rock dumps, and to survey the condition of the site.

Such sampling may include drilling of the waste rock dumps and leach piles, if necessary." Exhibit 1 at 1.

3. The letter requested Jumbo to provide Western with "access for discovery" and further requested a response "within five working days."

4. Notwithstanding the several procedural improprieties<sup>1</sup> that attended Western's request, Jumbo undertook to prepare an appropriate response to the request in accordance with Rules 26 and 34 of the Utah Rules of Civil Procedure.

5. Before that response could be transmitted to Mr. Alfors, and well before Jumbo was obliged to respond to Western's request, on or about July 28, 1997, Mr. Alfors served upon Jumbo a premature and, we think, unnecessary motion.

6. That is so, among other reasons, because Jumbo is agreeable to Western's request for discovery.

7. Such discovery must, however, accord with the following conditions, all of which must be met prior to any entry by Western upon the Drum Mine site:

a. Western shall provide Jumbo's attorneys and Mr. King with written notice of any such entry, at least ten (10) days beforehand, in order that Jumbo can make appropriate arrangements to escort Western's personnel around the Drum Mine site.

---

<sup>1</sup> Among other things, the letter was addressed to Mr. King rather than his attorneys, was actually mailed seven days after its date and demanded a response "within five days" of a lapsed date rather than the thirty days after proper service that is provided by Rule 34 of the Utah Rules of Civil Procedure.



b. Any and all discovery activities must be legal, i.e., approved by any and all agencies of government having operational jurisdiction over the Drum Mine.

c. Any and all discovery activities must be specifically approved by Jumbo, which approval shall not be unreasonably withheld.

d. Western shall provide Jumbo's attorneys and Mr. King with acceptable proof of Workman's Compensation coverage in the State of Utah for any personnel that will perform any discovery work on the Drum Mine site. And,

e. Western shall execute and deliver to Jumbo, a hold harmless and indemnification agreement, acceptable to Jumbo's attorneys and Mr. King, that will protect Jumbo and its personnel from and against any and all liability and loss arising out of the requested "access for discovery" and/or any and all discovery activities.

8. In the event that the foregoing response will not result in Western's withdrawal of the motion prior to its hearing date, Jumbo respectfully requests the Board to consider this response as a cross motion for a protective order, pursuant to Rule 26 (c) of the Utah Rules of Civil Procedure, that the requested discovery not be had or that it be had only in accordance with the foregoing conditions.

9. In this connection, it is noteworthy that there have been no significant changes at the Drum Mine site since Western's representatives sampled the heaps and dumps in 1990 and again inspected the property in December, 1993.

10. Finally, it should also be noted that the judicial determinations of reclamation responsibility that have so far been made by the courts of Colorado are not as inclusive as has been

suggested by Western, and that, in any event, those determinations are presently pending a Petition for Certiorari that was filed by Jumbo with the Supreme Court of Colorado on May 5, 1997.

11. For all of the foregoing reasons, Jumbo respectfully requests the Board to deny the discovery requested by Western or to permit it only upon the conditions recited in subparagraphs 7 a. through 7 e.

Respectfully submitted,

HOLLAND & HART LLP,

215 South State Street  
Suite 500  
Salt Lake City, UT 84111-2346  
Telephone No.: 801-595-7800  
Telefax No.: 801-364-9124

DATED: AUGUST 22, 1997  
SALT LAKE CITY, UTAH

BY:

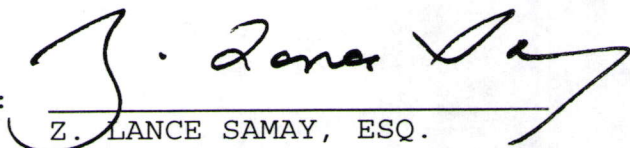
  
LAWRENCE J. JENSEN, ESQ., #1682

Z. LANCE SAMAY  
ATTORNEY AT LAW  
A PROFESSIONAL CORPORATION

ONE WASHINGTON STREET  
POST OFFICE BOX 130  
MORRISTOWN, NJ 07963-0130  
TELEPHONE NO.: 973-540-1133  
TELEFAX NO.: 973-540-1020

DATED: AUGUST 21, 1997  
MORRISTOWN, NEW JERSEY

BY:

  
Z. LANCE SAMAY, ESQ.  
ATTORNEYS FOR RESPONDENT  
JUMBO MINING COMPANY

JM082297.A1B



**Alfers & Carver, LLC**  
Attorneys At Law

Equitable Building  
730 17th Street, Suite 340  
Denver, Colorado 80202

Tel: (303) 592-7674

Fax: (303) 592-7680

July 14, 1997

VIA CERTIFIED MAIL—RETURN RECEIPT REQUESTED

Edwin B. King, President  
Jumbo Mining Company  
6305 Fern Spring Cove  
Austin, TX 78730

0013-0013

Re: Access to Drum Mine for Discovery Purposes

Dear Mr. King:

Western States Minerals Corporation ("WSMC") is named, together with Jumbo Mining Company ("JMC"), as a party to a petition by the Utah Division of Oil, Gas and Mining ("DOGM") for an order requiring immediate reclamation of the Drum Mine.

As you know, WSMC has had no occupancy of the Drum mine since late 1988, when JMC acquired the property. WSMC does not know the condition of the heaps and waste dumps that DOGM alleges must be reclaimed by WSMC. In order to defend itself against DOGM's proposed reclamation order, and to put a credible value on any potential liability that WSMC may be facing, WSMC must gain access to the Drum mine to take samples of rock, soil and water from the leach pads and waste rock dumps, and to survey the condition of the site. Such sampling may include drilling of the waste rock dumps and leach piles, if necessary. WSMC requests that JMC provide it access for discovery as provided in Utah Rules of Civil Procedure 26 and 34, which provide for discovery by entry onto land of any party.

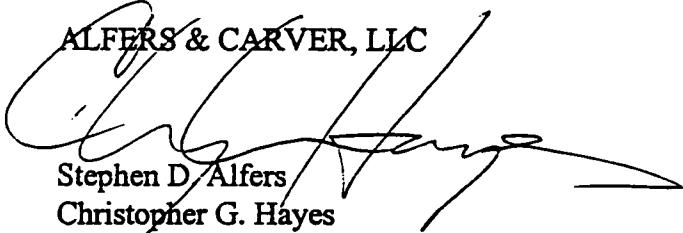
WSMC neither admits nor assumes any liability or responsibility for reclamation at the Drum mine by this request; it seeks access only for purposes of discovering evidence or information likely to lead to the discovery of evidence relevant to its defense of the petition.

Edwin P. King, President  
Jumbo Mining Company  
July 14, 1997  
Page 2

Please inform us within five working days whether you will provide the requested access.  
You may respond to WSMC at the address of Alferts & Carver, LLC shown above.

Very truly yours,

ALFERTS & CARVER, LLC



Stephen D. Alferts  
Christopher G. Hayes  
Attorneys for  
Western States Minerals Corporation

cc: Z. Lance Samay ✓  
James W. Carter  
John Carmody  
Thomas A. Mitchell, Esq.  
Daniel G. Moquin, Esq.  
Patrick O'Hara

## CERTIFICATE OF SERVICE

I certify that on August 22, 1997, I served a copy of a Response of Jumbo Mining Company to Motion for Order Granting Discovery to the following by

- ☐ U.S. Mail, postage prepaid
- ☒ Hand Delivery
- ☐ Fax

Daniel G. Moquin  
Assistant Attorney General  
3 Triad Center, Suite 475  
Salt Lake City, UT 84180

Thomas A. Mitchell  
Assistant Attorney General  
3 Triad Center, Suite 475  
Salt Lake City, UT 84180

Patrick J. O'Hara  
Assistant Attorney General  
3 Triad Center, Suite 475  
Salt Lake City, UT 84180

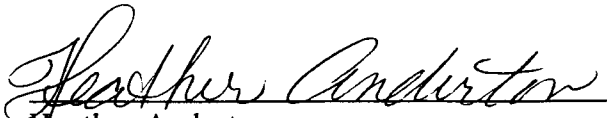
H. Michael Keller  
Van Cott, Bagley, Cornwall & McCarthy  
50 South Main Street, Suite 1600  
Salt Lake City, UT 84144

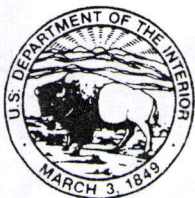
## MAILING CERTIFICATE

Further, I certify that on August 22, 1997, I served a copy of a Response of Jumbo Mining Company to Motion for Order Granting Discovery to the following by

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Fax

Steven Alferts, Esq.  
Alferts & Carver  
Attorneys for Western States Mineral Corp.  
730 17<sup>th</sup> Street, Suite 340  
Denver, CO 80202

  
Heather Anderton  
Secretary

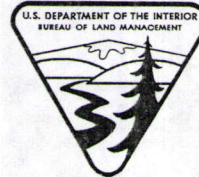
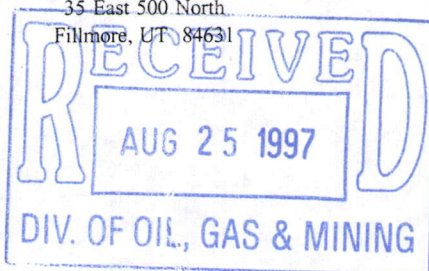


# United States Department of the Interior

BUREAU OF LAND MANAGEMENT  
HOUSE RANGE/WARM SPRINGS RESOURCE AREA

35 East 500 North

Fillmore, UT 84631



IN REPLY REFER TO:  
3800  
(U-054)  
UTU-072862

August 21, 1997

ALLEN R CERNY  
SECRETARY  
WESTERN STATES MINERALS CORPORATION  
4975 VAN GORDON STREET  
WHEAT RIDGE CO 80033

Dear Mr. Cerny:

We are in receipt of your July 23, 1997 letter in which you requested that we send to your companies copies of all correspondence between the BLM and Jumbo Mining Company (JMC). Please bear in mind that this is not the only office of the BLM with which JMC could conceivably correspond, and that we can only provide you correspondence between this office and JMC. We will try to accommodate your request by providing you with any correspondence relevant to your dispute with JMC, but to obtain any other documents you will need to submit a specific request and include sufficient funds for copying.

We have enclosed with this letter several documents which you have requested in your fax of August 14, 1997. We have also enclosed a serial register page and chronological list for your case file.

If you have any questions, please feel free to contact Ron Teseneer at (801)743-3126, or Sheri Wysong at (801)743-3125.

Sincerely,

Rex Rowley  
Area Manager

Enclosures

Serial Register Page  
Chronological List  
Missing Pages from UDOGM's Chronological List  
April 27, 1989 Letter from Ed King to UDOGM  
Page 2 of Docket 91-021  
Page 2 of Docket 91-002

cc: Wayne Hedberg, (UDOGM)  
Ed King, Jumbo Mining Company

BEFORE THE BOARD OF OIL, GAS & MINING  
DEPARTMENT OF NATURAL RESOURCES  
STATE OF UTAH

**F E D**  
JUL 30 1997  
SECRET, BOARD OF  
OIL, GAS & MINING

In the Matter of the Petition Filed by the Division of Oil, Gas and Mining for an Order Requiring Immediate Reclamation of the Drum Mine, from Western States Minerals, Corporation and Jumbo Mining Company, Millard County, Utah.	MOTION FOR ORDER GRANTING DISCOVERY  Docket No. 97-009 Cause No. M/027/007
--	--

COMES NOW Western States Minerals Corporation, a Colorado corporation ("WSMC") and asks the Utah Board of Oil, Gas and Mining ("Board") for an order granting discovery of persons, documents, real property and other things in connection with the above-captioned proceeding.

The "Petition Filed by the Division of Oil, Gas & Mining for an Order Requiring Immediate Reclamation of the Drum Mine" by the Division of Oil, Gas and Mining ("DOGM") is a request for a Formal Adjudicative Proceeding as defined by R641-100-200 and the Utah Administrative Procedures Act, Title 63, Chapter 466, Utah Code Annotated (1953, as amended). The normal discovery procedures of the Utah Rules of Civil Procedure apply to such proceedings. R641-108-900; 40-6-1 et seq., Utah Code Annotated (1953, as amended).

Rule 26 of the Utah Rules of Civil Procedure provides that it shall be analogous to Fed. R. Civ. Proc. 26; part (a)(5) of that rule provides that "Parties may obtain discovery by one or more of the following methods: . . . permission to enter upon land or other property under Rule 34 or 45(a)(1)(c), for inspection and other purposes . . . ."

WSMC and Jumbo Mining Company ("Jumbo") are named as parties to this proceeding. WSMC therefore requests leave of the Board of Oil, Gas & Mining Department of Natural

Resources, State Of Utah (the "Board") to serve upon Jumbo an order allowing WSMC, its agents and employees entry upon the premises of the Drum Mine for the purposes of measuring, surveying, photographing, testing, and sampling the heap leach piles, waste rock piles, adjacent soils and any surface or underground water found thereon. Such testing and sampling may include the use of drilling equipment.

WSMC's proposed activities are for the purpose of discovering facts and other matter relevant DOGM's allegations that WSMC is responsible for reclamation of part of the Drum mine site. The information sought is likely to be admissible in Formal Proceedings before the Board, or is likely to lead to the discovery of admissible evidence.

WSMC and Jumbo have been involved in lengthy litigation over reclamation responsibility at the Drum mine; despite clear language in the sale agreement and an unbroken series of court decisions affirming Jumbo's sole responsibility for reclamation, Jumbo has resisted assuming its responsibilities. DOGM has failed to require Jumbo to assume its responsibilities as operator, and has instead made the above-captioned petition to the Board. DOGM seeks to compel WSMC to reclaim part of the site, even though WSMC has satisfied the conditions subsequent for its permit transfer and surety release by DOGM. WSMC requires the information to be gained by access to the Drum mine to mount its opposition to the DOGM petition for agency action, and to form an opinion of its potential exposure to liability if its defense is unsuccessful.


#### PRAYER FOR RELIEF

WHEREFORE, WSMC requests the following:

1. An Order of the Board compelling Jumbo to allow SMC access to the Drum mine for purposes of discovery.

Requested this 28 day of July, 1997.

ALFERS & CARVER, LLC.



Christopher G. Hayes  
730 Seventeenth Street, Suite 340  
Denver, CO 80202  
(303) 592-7674

Attorneys for Western States Minerals Corporation

U:\CH Client\WSMC\Drum\Motion-Granting Disc.doc

Certificate of Mailing

I hereby certify that I have this day served the foregoing instrument upon all parties of record in this proceeding by mailing a copy thereof, properly addressed, with postage prepaid, to:

H. Michael Keller, Esq.  
Van Cott, Bagley, Cornwall & McCarthy  
Attorneys for Western States Minerals Corp.  
50 South Main St., Suite 1600  
Salt Lake City, UT 84144

Daniel G. Moquin, Esq.  
Asst. Attorney General - State of Utah  
Attorney for Division of Oil, Gas & Mining  
1594 West North Temple, Suite 300  
PO Box 140855  
Salt Lake City, UT 84114-0855

Z. Lance Samay, Esq.  
Attorney for Jumbo Mining Company  
1 Washington Street  
PO Box 130  
Morristown, NJ 07963

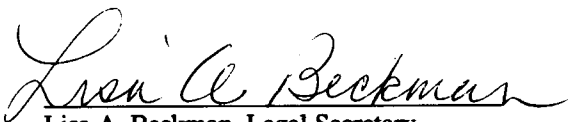
Thomas A. Mitchell, Esq.  
Asst. Attorney General - State of Utah  
Attorney for Division of Oil, Gas & Mining  
160 East 300 South, Sixth Floor  
P.O. Box 140857  
Salt Lake City, UT 84114-0857

Lawrence J. Jensen, Esq.  
Holland & Hart  
Attorney for Jumbo Mining Company  
215 South State Street, Suite 500  
Salt Lake City, UT 84111

  
Lisa A. Beckman, Legal Secretary

The original and one copy of the foregoing instrument was sent, via certified U.S. mail, postage prepaid to:

The Board of Oil, Gas & Mining  
Department of Natural Resources  
State of Utah  
1594 West North Temple, Suite 1220  
Salt Lake City, UT 84114

  
Lisa A. Beckman, Legal Secretary

---